STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF COLDWATER,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 151051

Court of Appeals No. 320181

Branch County Circuit Court
LC No. 13-040185-CZ

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CONSUMERS ENERGY COMPANY'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case presents important questions concerning public and municipal utilities' rights to continue providing service to a customer that a utility first served before other utilities.

According to Plaintiff-Appellee, the City of Coldwater (Coldwater), and the Court of Appeals, Rule 411 does not apply to a Municipality even when it purchases a premise previously served by a Public Utility and then wants electric service to that premise. The Court of Appeals has thus rewritten the holding of this Court in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 775 NW2d 155 (2011) with regards to the scope of Rule 411.

Also according to Coldwater and the Court of Appeals, MCLA 124.3, with an identical definition of customer to Rule 411, should be read as having a different definition of customer.[1] The change in definition, in opposition to this Court's decision in *Great Wolf Lodge*, includes a requirement that a customer be currently receiving service to prevent switching. Thus two standards now exist, one in Rule 411 and one in MCLA 124.3.

Coldwater complains that this Court has "upset the apple cart" (Reply pg. 2). In reality, the Court of Appeals has upset the settled law as pronounced by this Court in *Great Wolf Lodge;* opening the door for Municipal Utilities to not be restricted in their pursuit of customers of Public Utilities. In fact, recognizing that Consumers was already providing electric service to this property, the City Manager for the City of Coldwater wrote to Consumers on October 21, 2011, requesting that Consumers consent to having the Coldwater provide the electric service to the City's planned new facilities as required by MCLA 124.3. It would appear that the Court of Appeals is the entity that has changed the status quo.

[1] MCLA 460.10y(2) defines customer for MCLA 124.3(2) in the same way as Rule 411(1)(a).

For all these reasons, and those explained in more detail below, Defendant-Appellant Consumers Energy Company (Consumers) respectfully requests that the Court grant either peremptorily reverse the Court of Appeals or grant this application.

REPLY ARGUMENT

A. This Court Should Hold That *Great Wolf Lodge* is Still Good Law and Apply Its Holding to This Case.

Coldwater admits in its response brief that the Court of Appeals did not apply this Court's decision in *Great Wolf Lodge*.

> The holdings of the Court of Appeals in this case (as well as those of the circuit court) are correct and should not be reversed by this Court. However, the Court should use this opportunity [to] clarify the **erroneous** references in the *Great Wolf Lodge* case which spawned this litigation. Reply pg. 6 (emphasis added).

Coldwater states in its response brief that in the *Great Wolf Lodge* case this Court in its decision has: "erroneous references" Reply pg. 6, "problematic language" Reply pg. 6, "problematic references" Reply pg. 7, a "erroneous reference" Reply pg. 9 and "a mistake was made" Reply pg. 24.[2] Coldwater tries to couch its reply by trying to linking the errors and problems it sees with the *Great Wolf Lodge* case exclusively to language about Rule 411. In reality, if the Court of Appeals had followed the holding of this Court then Consumers as the first utility serving buildings or facilities on the premises then had the right to service the entire electric load on those premises.

> Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of

[2] According to Plaintiff: "In other words, this Court's conclusion was correct, but the reasons it gave for it was not." Reply pg. 8.

> all buildings on the property or division of the property by a public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities. [*Id*.]

Instead, the Court of Appeals held that "Rule 411 does not apply to municipal utilities." *Slip op* at 10. Next, it held that: "Under both MCLA 124.3 and Rule 411(1)(a), 'customer' means the building and facilities served. … Thus at the time Coldwater acquired the property and sought to demolish the pole barn building and provide electrical service to potential newly built buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers." *Slip op* at 12.[3]

Basically both the Court of Appeals and Coldwater want to ignore the premises rule as stated by this Court. Further, the Court of Appeals and Coldwater forget that the entity bound by the premises rule is the customer/premises served by a public utility. The fact that initially receiving service from a first providing utility, then binds that customer/premises does not impose Rule 411 on a Municipality unless it is in the role of a customer/premises owner.

Taken to its logical end, Coldwater has to claim that even if it is receiving service from Consumers Energy, it would not be a customer of Consumers Energy and apparently not bound by the rules and regulations of service as all other Consumers Energy customers are bound. In other words, apparently Coldwater can purchase a premise causing a break in the premises rule and Coldwater can then serve the premise itself. As an alternative, Coldwater could decide to continue to receive service from Consumers, however according to Coldwater, it would not have to pay the same rates as other customers as it is immune from MPSC oversight of any type.

[3] Plaintiff and the Court of Appeals also ignore the fact the MCLA 460.10y(2) defines customer for MCLA 124.3(2) in the same way as Rule 411(1)(a). There is no explanation as to why the Court of Appeals ignored this Court's interpretation of the term customer for Rule 411 when it invented its inconsistent definition of customer for MCLA 124.3(2).

A more logical position is that when Coldwater acts as a customer/premises purchaser (in this case acquiring a parcel of property already served by Consumers Energy), it has all the responsibilities and obligations of any other customer and is bound by this Court's holding in *Great Wolf Lodge*.

This is supported by this Court's holding when the Court stated: it was "irrelevant that TCLP is a municipal corporation not subject to PSC regulation." *Id*. Indeed, Rule 411(11) "grants a right to first entitlement" to a Commission-regulated utility "while limiting *the right of the owner of the premises* to contract with another provider for electric service." *Id*. at 42 (emphasis added). Acting as an owner of the premises, Coldwater should be bound by the same rules as any other premises owner.

B. Coldwater's and the Court of Appeal's Position Allows for Unlimited Loss of Customers and Duplication of Facilities.

As Coldwater states in its Reply:

> The plain meaning of the phrase customers "already receiving the service" is that the customer must currently be receiving service in order for the municipal utility to be precluded from serving.14 The Court of Appeals explicitly acknowledged and gave effect to this statutory language, stating "[n]otably, the phrase '"already receiving"' is in the present tense." (COA Op at 4, 11; Ex 1.) The test is not whether the regulated utility served in the recent past, still has equipment on the property, or professes a willingness to resume service. The regulated utility must actually be providing electric power to the buildings and facilities. That is what the statute says and that should be the end of the matter. Reply pg. 23.

Thus the ability to prevent switch from one utility to another as stated by the Court of Appeals and championed by Coldwater is that only customers "presently receiving" service from

a Public Utility are prevented from switching to a municipal utility.[4] If not receiving service "present tense", there is no restriction on switching and "that should be the end of the matter". Reply pg. 23. The consequences of the new rule created by the Court of Appeals and supported by Coldwater will have profound consequences on the ability of a Public Utility to retain customers.

According to the Court of Appeals' new "presently receiving" service rule, any break in service would allow a customer to switch. In addition, a Municipal Utility could offer special rates or discounts (not available to a utility regulated by the MPSC) to entice customers to do so. Coldwater ignores the ease by which there could be a break in service and instead touts it as an opportunity to gain customers in suburban areas. Reply pg. 9. Some examples of ways that a customer could change electric providers by a break in service include:

- When a business is sold, the prior owners could ask for a shut off of electric service, the new owners could then choose the original provider or a new provider.
- When a home is sold, the prior owners could ask for a shut off of electric service and the new owners could then choose the original provider or a new provider.
- A business at any time could ask that service be stopped or removed from its building. The business would then be free to switch electric providers.
- A homeowner at any time could ask that service be stopped or removed from their residence. The residence would then be free to switch electric providers.

[4] As noted in Defendant's original brief, the Court of Appeals reads the definition of customer in MCLA 124.3(2) to require presently receiving service. The Court of Appeals thus ignores this Court's interpretation of customer in *Great Wolf Lodge*.

- A large development, originally served by one provider, could have all new buildings and construction served by a different provider.

Using the Court of Appeals "presently receiving service rule" basically allows customers to leave the Public Utility at any time just by stopping service, even just for a moment.

Coldwater then claims that there is very little duplication of serve brought about in this instant case and thus tries to downplay this public policy consideration. However even Coldwater admits that it will have to construct a new "electric substation on the property" to provide the electric service already available by a currently constructed Consumers Energy substation.[5] Plus, when looking at these types of public policy issues, the focus is not on the duplication of facilities for this one case, but rather the consequences for the entire populace. If widespread switching occurred, then not only would facilities at each location be duplicated (all at varying costs) but different customers would be disadvantaged in different ways. Current customers of the Municipal Utility would have to absorb the cost of the newly built duplicative facilities built to serve the new customer(s). Current customers of the Public Utility would have to absorb the cost of already built facilities that are no longer financially supported by the customers the facilities were originally built to serve. While Municipal Utilities increase their number of electric customers, the remaining customers of the Public Utility will have to foot the bill for each customer that switches.

As this Court noted in *Great Wolf Lodge*, the Public Service Commission enacted Rule 411 to "avoid unnecessary and costly duplication of facilities." The Court of Appeals' holding undermines this purpose and ignores that purpose in its reading of MCLA 124.3(2). The Court of Appeals' decision makes the right of first entitlement "subject to unilateral abrogation by

[5] Even a basic substation tends to cost in the hundreds of thousands of dollars to construct.

property owners," something which this Court explicitly rejected in *Great Wolf Lodge*. 489 Mich at 40 fn 22.

The ability of the Municipal Utility to obtain customers first served by a Public Utility causes duplication in facilities and increased costs to customers. This defeats the purpose of MCLA 124.3(2) and renders it nugatory. This is also in contradiction to this Court's holding in *Great Wolf Lodge*.

CONCLUSION AND REQUESTED RELIEF

Coldwater states in its Reply, pg. 18: "Had the courts below applied literally this Court's reference in *Great Wolf Lodge* to landowners being bound by Rule 411(11), the outcome of this case might have been different." Consumers Energy agrees with this statement. In fact Consumers Energy believes that rulings of this Court should be followed by the Court of Appeals. Accordingly, this Court should either peremptorily reverse the Court of Appeals or in the alternative grant leave to appeal.

Respectfully submitted,

Dated: June 9, 2015

By: /s/ Eric V. Luoma

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